THE RELIEF OF THE SUPREME COURT OF THE UNITED STATES.

THE question of the relief of the Supreme Court of the United States has been much discussed for a few years and has excited not a little interest. The accumulation of old cases hanging on from term to term, and growing greater annually in number from the inability of the court even to dispose of the new cases yearly reaching them, shows plainly that, for the benefit of suitors, even more than for the relief of the judges, some change is imperatively demanded. This is doubtless a fact in the problem which few will question—something must be done. But, when we come down to the means of attaining the end, the question becomes much more difficult. When the American Bar Association discussed the subject at Saratoga in 1882, it appeared that irreconcilable differences existed, not only in the committee, which had been appointed to consider the subject, but in the body itself as well; and the resolution recommending the plan of a Court of Appeals was only carried by 39 votes to 27. The question has been the subject of much discussion since then in different parts of the country, and there have been introduced into Congress more than a dozen bills, many of them radically differing from each other. In the midst of such great variety of opinion, it is entirely impossible to say what will be the outcome of the matter, though it may be presumed from the interest manifested that, within a few years at most, some important legislation on the subject will be passed.

The plans, which appear to receive the most support are, (1) the establishment of a Court of Appeals, wherein shall be finally decided many of the cases which now reach the Supreme Court, and (2) the division of the court into sections which shall sit separately, the decisions in all cases to be rendered by the whole court. The first-named or Davis plan seems to meet with most favor, and its features occur more or less markedly in several of the pending bills. The very serious objection that it would far from conduce to uniformity of decision has been met by other bills embodying a part of its plan.

It is not our purpose, however, to enter into any elaborate examination of the different bills before Congress, for we are

unable to see that any such great change in the matter is needed, as is generally advocated. We think it can be shown that, by repealing a few of the acts giving jurisdiction to the Federal courts in certain specified classes of cases, it can be made easy for them to dispose of their whole annual accession and in the course of some years to bring the lists again down to a condition where they can be cleared up each year. If this is possible, without depriving suitors of rights which they ought to have, we assume that it is desirable. There can be no question that, by itself alone, the creation of a new court is not to be wished. The expense of the body is a fair argument against it, unless it is a real necessity; and, more than that, it is certainly the case, and it seems to be conceded, that the present constitution of the Federal courts is preferable to the proposed new one, with a Court of Appeals intermediate for some cases. One of the main objects to be attained is the avoidance of those great delays, which are a practical denial of justice in many cases; and it should not be forgotten that, whatever plan for the Court of Appeals might be fixed on, some, at least, of the cases would have to drag their weary length through both the Court of Appeals and the Supreme Court, before the unhappy suitors would at length be released. This is not desirable. The present plan, if it can do the work, is certainly preferable, and thus much, we believe, is admitted on all sides.

The growth of the federal judicial business was for many years very gradual, the cases on the lists of the Supreme Court being decidedly few in number until the middle of the century; not until 1858 did they even reach 300, and in 1870 for the first time they exceeded 600. In 1875 there were 974 cases on their list, in 1876 1000, in 1880 1202, in 1881 1013, in 1882 1026, and in 1883 1070. The total average annual accession for the last ten years has been about 425 cases, the new cases docketed to October 1881, numbering 399; to October 1882, 422, and to October 1883, 419.[1]

[1] This last number is subject to slight variation, "as there may be four or five cases docketed to-day (May 3d) and Monday, which will increase the number for 1883." Our facts in relation to the condition of the docket, as well as to the number of cases decided *per annum* are taken from the report of the Committee of the American Bar Association (Vol. 5, p. 344–364), and from information kindly furnished by Mr. McKenney, the clerk of the Supreme Court. There is some discrepancy between the two sources of information as to the total number of cases on the list, which we cannot explain. All our information in regard to the years 1881–2–3 is taken directly from Mr. McKenney's figures, and we presume there can

The number of cases annually disposed of varies of course not a little, but it averages 360. It is therefore clear that their business has grown unmanageable, only within the last fifteen years, and it is further clear that the great number of cases on their docket is liable to be not a little misleading; the vast majority of these cases are *remanets*, reaching back not a few years. The average annual accession exceeds the number of cases they are able to dispose of by about sixty-five (*a very little over eighteen per cent.*). This increase of business is owing to different causes, but there is one which stands out specially prominent. Judge STRONG (North Amer. Rev. cxxxii., p. 438) pointed out the causes at length in his article written shortly after he left the bench, and the same subject has been recently examined more elaborately by a Committee of the Law Association of Philadelphia.[1] They found that over *one-third* (34.5 per cent.) of all the cases found their way to the Supreme Court exclusively on the ground of citizenship, and they

---

be no doubt of their correctness. We have not felt called upon to endeavor to explain the difference, as the two sources of information virtually agree as to the point with which we are particularly concerned—the number of new cases coming up to the court *per annum*.

[1] These gentlemen examined seven volumes of the reports (vols. 99–105 inclusive), and found that the cases were as follows:

Cases from territorial courts	30
" " the Court of Claims	43
" " state courts	90
" " Supreme Court of District of Columbia	38
" by or against national banks	35
Patent and copyright cases	49
Land grant	10
Admiralty	29
Tax cases and cases against United States officers	43
Bankruptcy cases	20
Cases in which the United States was a party	31
" involving the construction of laws or treaties of the United States	8
Cases in which the jurisdiction of the circuit court was acquired by citizenship only	166
Cases in which the ground of jurisdiction does not appear, but presumably it was, almost without exception, citizenship	147
	739

They then assume that 100 out of the 147 cases under the last item depended entirely upon citizenship; there can be no doubt that this assumption is in reality considerably within the mark.

at once saw that here was an opportunity for reduction. Others also have seen the same thing, and several of the pending bills propose a reduction by closing a part of this avenue. But cannot more be done? *Why not cut off the whole of this branch of jurisdiction at once, and thereby relieve the court from* 34 *per cent. of its labors? This would at once put them on their feet again, and enable them to do more than dispose of the annual accession of new cases*, for we have already shown that a relief of slightly more than 18 per cent. is all that is imperatively demanded. Judge STRONG has considered the expediency of more or less radically altering the classes of cases to be decided by the Supreme Court, and he lays special stress (*ubi supra*, p. 446–47) upon the difficulty and comparative want of importance of citizenship cases. The idea of abolishing the jurisdiction of the Federal courts in such cases was thrown out by Mr. Hammond of the House Judiciary Committee (see Phila. Legal Intell., April 11, 1884, p. 144–45, where the proceedings of that committee on April 1st are reported), and it appears to have been concurred in by Mr. Reed of Philadelphia, who was before that committee to advocate certain measures, and to have met more or less approval from Mr. Culberson. Why should it not be done, *and the whole problem be thereby solved at once and for many years?*

It has been suggested, we believe, that it would be unconstitutional, but this can hardly be contended. The provision of the constitution certainly does not, *proprio vigore*, vest the full extent of the Federal judicial power in the courts which Congress may establish, and confer upon them power to exercise it without legislative regulations. It cannot have this meaning, for an unanswerable question would be, which of the inferior courts is to exercise the jurisdiction, and under what regulations? Though the judicial *power* does extend to controversies between citizens of different states, yet Congress need not call it into being, just as it need not pass a bankrupt law, declare war, or execute other powers conferred by the constitution. And it is a well-known fact that, for over eighty-five years, Congress exercised but little comparatively of its power in conferring jurisdiction in citizenship cases, and this was never held to be unconstitutional.

It is, therefore, apparent that more than one-third,[1] of the cases

[1] Judge STRONG, Id. p. 447, says that stopping citizenship and alien cases at an

reaching the Supreme Court can be cut off by this simple process, and there are strong reasons why it should be done, and we, at least, fail to see any valid argument against it. This class of cases is one that gives special and peculiar trouble to the court, owing to the fact that it calls upon them to examine so many systems of law. The lawyer who has more than a faint acquaintance with the law of two or three states is not only a man of learning, but must have been endowed with a most rich measure of that precious gift—memory. The most learned of us is in reality not competent alone to undertake and conduct a law proceeding in a state where he is not at home. He may have the theory perfect and at his fingers' ends, but some wretched little point, which the lawyer of the *locus* would be entirely familiar with, will miss him, and he will soon be in a snarl. So difficult is it that at least some lawyers decline the practice entirely. Yet the Supreme Court is called upon to examine into the law of no less than *forty-seven* different jurisdictions other than that properly of the United States. The difficulty of this must be enormous and hardly capable of exaggeration; we all experience trouble enough in settling the law of one jurisdiction. Probably, the judge arises from the argument of a case of this nature, after the conflicting and not always precisely accurate statements of the law by counsel, with but the vaguest knowledge of what the law really is. He has, then, subsequently, to spend laborious hours in searching through statutes and law reports which are new to him; and, in this labor, a portion at least of the usual incentive is wanting, for he is not working in his own field, nor is he spurred on by the knowledge that his work will be of daily use to him in the future. (See Judge STRONG'S article, Id. p. 440–46, where the difficulty in this class of cases is specially emphasized.) Then, there is this additional trouble that, as the Supreme Court does not universally, in cases of this nature, follow the law of the state, their labor is not at an end when they have discovered the latest state decision upon the subject; but they must make an elaborate examination and decide whether there has been a conflict of decision in the state upon the subject, and what was the law at the date the plaintiff acquired his rights; and, then, finally, whether, on the whole case, it is one where, under their own

intermediate court would relieve the Supreme Court of "at least one-half" of its cases. As there are but few alien cases, his estimate of citizenship cases is evidently larger than that which we borrow, but we do not know on what it is based.

decisions upon this very difficult subject, they will feel obliged to adhere to the latest state decision or will decline to follow it.

We think these facts show that the jurisdiction depending exclusively on citizenship involves great and peculiar trouble, and it would seem, therefore, that the decision of a hundred such cases must demand not a little more time and labor than does an average hundred cases of strictly Federal law. Therefore, as the citizenship cases constitute slightly more than a third of all their cases, we should, by abolishing root and branch this source of jurisdiction, reduce their labor considerably more than a third. This is a vast reduction, and the only question that remains is the advisability of the step. Is there any reason to-day for the court's being troubled with this mass of cases which do not belong to the system of jurisprudence which it is their function to erect? We cannot see that there is. The reason for the constitutional grant of jurisdiction in such cases is well known and was doubtless a hundred years ago a very valid one, but it would seem to have no vital force any longer. At the time the provision was adopted, we were emerging from a condition in which each state had been actively engaged in erecting its own walls of restrictions, with the view of helping itself and injuring its neighbors, and there is no doubt that there were strong feelings of jealousy and distrust among the different states of the confederation. This condition of affairs was the very reason for the making and adoption of the constitution, and it is highly natural, therefore, that it contained the provision. There would likely, otherwise, have been frequent bickerings and discontents about verdicts and decisions going against citizens suing in states where they did not live, and one of the very purposes of the constitution would have been frustrated for a time. But the course of nearly one hundred years has changed all this. It is hackneyed now to speak of the nearness of all parts of the country to each other and of the closeness with which we are bound together in all the affairs of daily life, but it is only the more true, because hackneyed. It is undoubtedly the case that San Francisco is effectively as near us to-day as Boston was to Richmond a hundred years ago. The New Yorker is vastly better acquainted to-day with the Chicagoan than he then was with the man from New Haven. We are all closer together in point of mere time, and in other matters our closeness to each other is even greater. And this constant intercourse and knitting of interests has had that effect which

was to be expected. We have become better friends, more similar in manners and customs, more willing to trust each other, and we do not now look with staring eyes at the citizen of another state as he passes us in the street or we deal with him. On the contrary, we daily see and deal with many of them, without even knowing it, or caring, if we do. It may fairly be said that that prejudice, which was the cause of the constitutional provision, is a thing of the past. If it was then, it is no longer, the case that a citizen of any state need fear that he will fail of receiving a fair trial, let his suit be in what state you please. We must not forget that, in the federal as well as the state court, he will meet with a jury of citizens of another state than his; and, if the change proposed is made, the only difference will be that he will have his trial presided over by a judge, who is also a citizen of another state than he, which may, possibly, not be the case, when he has the right to sue in the federal courts. We should be loath to believe that this would put the party from a distance in any peril of not getting an impartial trial, nor do we think there is any evidence whatsoever that such would be the case.

If we are right as to the question of prejudice, there is certainly no valid reason why the jurisdiction should not be abolished. If it is said that their jurisdiction is necessary in such cases on account of questions of commercial law, the answer is plain that by far the greater number of such cases—and often growing out of a transaction identically the same as that which it is argued the federal courts should decide—*must inevitably* be subject exclusively to the courts of the state; and that system sadly lacks uniformity, which holds a defendant not liable on one contract and yet liable on another, when the sole difference between the first and the second is that the parties to the second are entitled to sue in the federal courts. And in the vast majority of such cases, the federal courts are, by universal admission, called upon, merely owing to adventitious circumstances, to administer the law of another forum. It is certain that they cannot exercise this function any better than the courts of the state, whose very breath of life is the law in question. As to the comparatively few cases of this nature, in which they decline to follow the law of the state as expounded by her tribunals, it is submitted that their soundness, as also their expediency, are matters of grave doubt. This line of decision has given rise to another great element of uncertainty as to party's rights—as well

citizens as non-citizens of the state—and has unquestionably not attained any such degree of definiteness as enables counsel to advise on the subject. The decisions are undoubtedly very conflicting, the question is one of the greatest difficulty and obscurity in itself, and the court has not succeeded in elaborating any system out of it, which offers a reasonable prospect of a scientific basis.[1] We think, therefore, that even those who support this class of decisions, must feel that their importance is not sufficiently great to render it worth while to yield up the great prospect offered of relieving the court without the creation of new courts and complicated machinery. It is apparent that this one change will make such a reduction that there would probably be no necessity for several decades, at least, to erect a new court, and he is an unwise physician who applies radical remedies before there is an imperious necessity. The country is certainly growing with tremendous strides, and it is likely that litigation will increase with the growth of population, but we can by no means say that it will grow in anything like the same proportion; and, if one simple remedy can enable the court at its present rate to dispose of considerably more than the annual accession, it is surely not advisable to apply such heroic remedies as are advocated. The future is so uncertain that it is not best to make great changes, when a small one will remedy the present evil. Let us rather provide for our present needs by simple means, and not legislate in the dark for a condition of affairs, which is, maybe, to exist several decades from the present time. Who can say what effect the vast changes going on in our midst in monetary affairs and commercial relations will have upon the law business of the country? Who can say what will be the effect of that tendency to centralization of business, which is one of the most striking features of the day, and which is but beginning to have its effect? Where, in the past, a thousand transactions were performed by as many different people, they are often now performed in an hour or two by one individual or officer of a corporation. And, whatever we may think of the corporations and their modes of doing business in certain aspects, there can be no doubt that, in the long run, there must be less litigation growing

[1] See this subject reviewed at length by the writer in the Southern Law Review for December 1882, p. 452; see also article by Mr. Henry Reed in Am. Law Rev., April 1875; and by Mr. William B. Hornblower, Am. Law Rev., xiv., p. 211.

out of a given number of cases operated by one practised hand than by the many. The one hand is soon far more skilful than is the average of the many, and is, moreover, likely to act under the guidance of better legal advice than are the many. There can be no doubt, we take it, that the tendency of companies for the insurance of titles to real estate is greatly to lessen litigation on that subject, and the same may be said of all bodies of a kindred nature. Such bodies are daily springing up among us, and have undoubtedly had a marked influence in some places in reducing law business. Is it not to be presumed that they will continue to increase in number and in the classes of subjects to which they apply, and that they will spread over the whole country? This is not the place to go into these questions at length, and we merely cite them as elements on which we can put our hands, and which we can see must have a marked operation as a set-off to the tendency to increase of judicial business from growth of population. Others could be named, and there are probably a thousand similar elements, which we cannot even see, let alone know their effects; and we submit again therefore, that it is not the part of a wise statesman, in the midst of such uncertainty as to the future, to advocate radical change, until the time arrives when it is apparent that some fundamental measure is the only means of attaining the needs of the then present.

Besides the citizenship cases, there is at least one other source of jurisdiction, the necessity of which it is difficult to see. We refer to cases from the District of Columbia. These reach the Supreme Court in large numbers, constituting a little over five per cent. of their total business. Their removal would therefore be a marked relief, and a bill has been introduced into the Senate with that view by Mr. Ingalls. It is not easy to see why the time of the highest federal court should be wasted in deciding miserable disputes growing out of contracts to pave the streets of Washington, or to hear cases depending exclusively upon the old Maryland law, whenever the sum in dispute exceeds $2500 and the defeated party is of a litigious nature. The only desideratum would appear to be that these cases should be decided by a competent tribunal under the control of Congress, and with a revisory body. The Supreme Court of the District certainly fills these requisites. The passage of the Ingalls bill would therefore seem to be highly advisable.

Territorial cases involving more than $1000 constitute another

class of cases, which seems to us out of place in the Supreme Court, though we speak with much diffidence on this subject, as no bill has been introduced to cut off this source of cases, and as there may be some controlling reason for the existence of the jurisdiction, of which we are not aware. The territories must sooner or later elaborate a system of law for themselves as states, and it would probably be well for them to begin early and not to enter the Union as states without an "unwritten law" based on law decisions of their own. Of course, all questions growing out of their organic law would necessarily reach the federal Supreme Court as involving the meaning of a United States statute, but why questions upon the law of negligence or of emblements and kindred subjects in a territory, should be permitted to make a drain upon the time of the Supreme Court, when that time is so imperatively needed for other things, we are at a loss to see. The review they already have in their own Supreme Courts, ought to be enough for their comparatively unimportant business. The cases from these courts constitute a little more than four per cent. of all the cases in the United States Supreme Court, and it would, therefore, doubtless be quite within bounds to assume that, if this branch were cut off, it would make a reduction of two per cent.

The jurisdiction conferred upon the District Courts (and thence indirectly to the Supreme Court in error, when the matter in dispute exceeds $2000), by the fifteenth clause of sect. 563 of the Revised Statutes of all suits by or against national banks, also offers an opportunity for reduction. There is no good reason why an ordinary suit depending entirely on state law (*e. g.*, a suit on promissory note or upon mortgage) should take the time of the federal courts, simply because a bank is a party; and the jurisdiction in such cases could easily be taken away, leaving questions of the interpretation of the charter or the powers of the corporation under the United States laws to reach the Supreme Court on other well-known grounds. The cases by or against national banks constitute a little less than five per cent. (4.73), and this ground of relief, it may therefore be assumed, would remove from one and a half to two per cent. at least of the cases—another very material reduction.

It is our desire entirely to avoid any *quasi* political question in this article, but we ought at least to mention the legislation proposed in sects. 2, 3, 4 and 6, of the bill introduced by Mr. Town-

send, proposing the repeal of a part of the jurisdiction in civil rights cases. This has in its favor at least the argument that it would afford relief, whatever may be said for or against it on other grounds.

We think we have shown conclusively that the needed relief of the court can be attained in the way proposed, without the creation of any new court whatsoever, and without in any way damaging either the court itself, the rights of suitors, or the interests of the government; and, surely, if this be so, it is immeasurably the preferable mode. The measures proposed would enable the court in the course of not very many years to dispose of all their arrearages, and, even if it is thought that those arrearages should be cleared up more rapidly, it would be very easy to create a commission for that purpose. Such a body could be arranged upon the plan of one of the pending bills, and all the cases now on the list, which do not involve a question distinctively of federal law, be referred to it for its final decision, with such other regulations as might be thought best. But even this temporary new court does not seem necessary or even expedient.

SUMMARY: Number of new cases per annum 425; number of cases decided per annum 360.

The relief of the court from the citizenship cases only would reduce the new cases per annum to 279, and thereby enable them to dispose of as many as 81 old cases each year; and the list would not become unmanageable again, until the annual accession of cases increases by from one-quarter to one-third.

Their relief from citizenship and District of Columbia cases would reduce the new cases per annum to 258, and enable them to dispose of 102 old cases each year; and the list would not become unmanageable again, until the annual accession of cases increases by from one-third to one half.

Their relief from citizenship, District of Columbia, national bank and territory cases would reduce the new cases per annum to 243, and enable them to dispose of 117 old cases each year; and the list would not become unmanageable again, until the annual accession of cases increases by nearly one half.

WILLIAM M. MEIGS.

Philadelphia.